No. 83-1848

In the Supreme Court of the United States

OCTOBER TERM, 1984

BERNARD P. ELKIN AND BOSTON PNEUMATICS, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the district court was required to submit to the jury the question of the materiality of petitioners' false statements in a prosecution under 18 U.S.C. 287 and 1001.

2. Whether a letter falsely certifying that petitioners had incurred certain costs in connection with a government defense contract supported their conviction under 18 U.S.C. 1341.

3. Whether petitioner Elkin's conversations with his former attorney concerning a sham company used by petitioners to defraud the government were protected by the attorney-client privilege.

4. Whether the trial court abused its discretion in refusing to excuse a juror who had "dozed a couple of times" during the trial.

5. Whether a corporate defendant may be sentenced to probation under 18 U.S.C. 3651.

6. Whether miscellaneous alleged misconduct by the government and the district court denied petitioners a fair trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 731 F.2d 1005.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1984. The petition for a writ of certiorari was filed on May 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of (1) filing a false payment claim on a government defense contract, in violation of 18 U.S.C. 287; (2) submitting false statements in connection with that claim,

in violation of 18 U.S.C. 1001; and (3) mail fraud, in violation of 18 U.S.C. 1341. Petitioner Elkin also was convicted of obstructing the grand jury's investigation of the false payment claim, in violation of 18 U.S.C. 1503.[1] Elkin was sentenced to a five-year term of probation and was ordered to pay restitution in the amounts of $119,534 to the government and a total of $99,625 to two subcontractors. The district court suspended imposition of sentence on petitioner Boston Pneumatics, Inc. (BPI), but ordered BPI to pay the same restitution imposed upon Elkin. The court of appeals affirmed petitioners' convictions, but vacated their sentences and remanded for resentencing. Pet. App. 1a-19a.[2]

The evidence, as set out in the opinion of the court of appeals (Pet. App. 3a-6a), showed that in August 1978 the United States Department of Defense awarded BPI a contract to produce globe stop valves. On June 27, 1979, Elkin, BPI's president and principal shareholder, submitted a false $112,179.60 claim for a progress payment on the contract, representing that BPI had incurred expenses of $131,000 for parts allegedly purchased from Etoile Machine and Tool Co., Inc. In fact, Etoile was a sham company formed by Elkin, whose business existence consisted solely of a telephone located in the home of a BPI employee whom Elkin had instructed to answer in the name of Etoile. Furthermore, another company had produced the parts and had

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[1]Elkin was acquitted on another obstruction count. See Tr. 1364-1366, 1418.

[2]The court of appeals concluded that since the district court had not placed BPI on probation, it had no power to suspend the imposition of sentence or to impose restitution on that petitioner (Pet. App. 11a-14a). The court also held that the district court lacked the power to impose restitution in an amount that exceeded the fraudulent claims charged and proven at trial, or to require any restitution to the subcontractors who did not sustain any financial loss from petitioners' crimes (*id.* at 14a-19a).

billed BPI $45,000, rather than the $131,000 Elkin had alleged in the payment claim. In August 1979, the government paid Elkin $65,142 on the basis of the June 27 payment claim. Several months later, BPI defaulted on the contract without providing the government any globe stop valves or parts.

During its investigation of BPI's performance to determine whether BPI was entitled to keep the progress payment, DOD requested Elkin's attorney to supply proof that Etoile had made the contracted-for parts and had been paid for them. In response, in December 1981 Elkin provided his attorney, and the attorney mailed to DOD, a "verification letter" purportedly signed by Elkin's accountant, which falsely certified that Etoile had made the parts and had been paid for them.[3]

Petitioners subsequently became the subject of a grand jury investigation. Dohn, the former BPI employee who had maintained and answered the Etoile telephone, testified that Elkin had instructed him to misrepresent to the grand jury that Elkin had nothing to do with Etoile and that Etoile was the tool of Elkin's former attorney, who had incorporated Etoile at Elkin's request. Dohn further testified that Elkin had instructed him to state falsely to the grand jury that all records relating to the globe stop valves contract had been destroyed during a burglary.

ARGUMENT

1a. Petitioner contends (Pet. 9-12) that the court of appeals erred, and thereby created a conflict among the circuits, in stating (Pet. App. 9a-10a) that materiality is not an essential element of either 18 U.S.C. 1001 or 287. Whatever conflict may exist among the courts of appeals on

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[3]Indeed, BPI had made no payments to any company for the parts (Pet. App. 5a).

that issue, however, does not warrant resolution by the Court in the context of this case, since the false claim in this case was undeniably material to the making of the progress payment and a finding of materiality was in fact made in the district court. In its charge to the jury, the district court unequivocally instructed that, in order to establish an offense under Section 1001, it must be proved beyond a reasonable doubt "[t]hat the false statement or false document related to a material matter" (Tr. 1371). Likewise, the court charged with respect to Section 287 that "[t]he making or presentation of a false claim is not an offense unless the falsity relates to a 'material' fact" (Tr. 1373).

b. Petitioner also argues (Pet. 12-13) that the courts below erred in ruling that materiality is a question of law to be decided by the court (Pet. App. 9a; Tr. 1372-1373).[4] This Court has recently denied certiorari in cases presenting the same contention in the context of prosecutions brought under 18 U.S.C. 1001 and 1623. *Cox* v. *United States*, No. 82-2069 (Oct. 3, 1983) (18 U.S.C. 1001); *Abadi* v. *United States*, No. 82-1954 (Oct. 3, 1983) (18 U.S.C. 1001); *Isenberg* v. *United States*, No. 82-967 (May 16, 1983) (18 U.S.C. 1001); *Falco* v. *United States*, No. 82-882 (Apr. 4, 1983) (18 U.S.C. 1623). There is no reason for a different result here.[5]

Contrary to petitioners' suggestion (Pet. 12-13), the great weight of authority among the courts of appeals is consistent with the view that the issue of materiality under both 18 U.S.C. 1001 and 287 is for the court to determine. See, *e.g.*,

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[4]With respect to both the Sections 1001 and 287 offenses, the district court instructed the jury (Tr. 1372-1373) that "[t]he issue of materiality, however, is not submitted to you for your decision but is a matter to be determined by the Court. You are instructed that the alleged facts, charged in the indictment as having been falsified, would be material facts."

[5]Petitioners have suggested no distinction between Sections 287 and 1001 for purposes of this issue.

United States v. *Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983) (Section 287); *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983) (Section 1001); *United States* v. *Fern*, 696 F.2d 1269, 1274 (11th Cir. 1983) (Section 1001); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982) (Section 1001); *United States* v. *Haynie*, 568 F.2d 1091, 1092 (5th Cir. 1978) (Section 287); *Johnson* v. *United States*, 410 F.2d 38, 46 (8th Cir.), cert. denied, 396 U.S. 822 (1969) (Section 287); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967) (Section 1001); *United States* v. *Ivey*, 322 F.2d 523, 529 (4th Cir.), cert. denied, 375 U.S. 953 (1963) (Section 1001); *United States* v. *Clancy*, 276 F.2d 617, 635 (7th Cir. 1960) (Section 1001); *Weinstock* v. *United States*, 231 F.2d 699, 703 (D.C. Cir. 1956) (Section 1001).[6] Petitioners suggest, however, that the better rule is found in the Ninth and Tenth Circuits, which have approved the practice of submitting the question of materiality to the jury. See, *e.g.*, *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979).

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[6]See also 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (3d ed. 1977 & Supp. 1980). Moreover, this Court has recognized that the materiality of false statements generally is a question for the court. In *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929) (citation omitted), construing the pertinency requirement of a statute proscribing refusal to answer questions by congressional committees, the Court stated:

> The question of pertinency * * * was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.

Nevertheless, petitioners have cited no case, and we are aware of none, in which a court has overturned a conviction under 18 U.S.C. 1001 or 287 on the ground that the issue of materiality was not submitted to the jury. Although the Ninth Circuit has held in two cases that the trial court erred in itself deciding the question of materiality rather than submitting it to the jury, in both cases it affirmed the convictions because it was clear that the statements at issue were material. See *United States* v. *Valdez*, 594 F.2d at 729; *United States* v. *East*, 416 F.2d 351, 354-355 (1969). The Tenth Circuit has not addressed the question whether a trial court commits reversible error by deciding the question of materiality. See *United States* v. *Irwin*, 654 F.2d at 677 n.8, and cases cited therein.[7]

Here, there can be no possible doubt that petitioners' false statements concerning BPI's performance of the government contract were material, *i.e.*, that they "could affect or influence the exercise of governmental functions" and had a "natural tendency to influence * * * agency decision." *United States* v. *Carrier*, 654 F.2d 559, 561 (9th Cir. 1981). Petitioner does not contend otherwise. See also *United States* v. *Voorhees*, 593 F.2d 346, 350 (8th Cir.), cert. denied, 411 U.S. 936 (1979) (defendant who applied for and received illegal payments is not in a position to assert that his false statement was not material on the ground that it

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[7]The remainder of the cases cited by petitioners also do not advance their argument. Most simply reiterate that materiality is an essential element of Section 1001 without considering whether the question of materiality is one for the court or the jury. See *United States* v. *Voorhees*, 593 F.2d 346, 349 (8th Cir.), cert. denied, 411 U.S. 936 (1979); *United States* v. *Talkington*, 589 F.2d 415, 416 (9th Cir. 1979); *United States* v. *Deep*, 497 F.2d 1316, 1321 (9th Cir. 1974) (en banc). Moreover, as the more recent cases cited in the text above demonstrate (see page 5, *supra*), to whatever extent *Voorhees* suggests that the question of materiality is one for the jury rather than the court, it is not the law presently prevailing in the Eighth Circuit.

was incapable of producing illegal payments). Because the materiality of petitioners' statements was clearly established, there is no reason to believe that any other court of appeals would have granted petitioners the relief they seek. Thus, to whatever extent a conflict may exist, the present case does not provide an appropriate occasion for this Court to address it.

2. Petitioners' mail fraud conviction was based on the December 1981 mailing of the "verification letter" falsely certifying that Etoile had produced the parts and had billed BPI $131,000 for them. Petitioners' contention (Pet. 15-16) that the mailing, which post-dated petitioners' receipt of the progress payment by two years, was not sufficiently related to the fraudulent scheme to justify their conviction under 18 U.S.C. 1341 was correctly rejected by the court of appeals (Pet. App. 8a (bracket in original)): "The government established at trial both that the Verification Letter was false and that it was 'a necessary step in executing the scheme[] because it was designed to lull' the Department of Defense into believing that the progress payment had been properly made. *United States v. Angelilli*, 660 F.2d 23, 36 (2d Cir. 1981), *cert. denied*, 455 U.S. 910 (1982). Thus, the fact that the Verification Letter was mailed after [petitioners] received the progress payment in no way suggests that it was not sent in furtherance of the scheme to defraud."[8]

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[8]As the court of appeals further observed (Pet. App. 8a-9a):

> [Petitioners'] reliance on *United States v. Maze*, 414 U.S. 395 (1974), is misplaced. In *Maze*, the defendant had purchased food and lodging with a stolen bank credit card; the mailings charged in the indictment were the mailings by the merchants of the bills to the bank and the mailing by the bank of a bill to the owner of the stolen card. The Court concluded that these mailings were not within the contemplation of § 1341 because they could not have served to conceal the fraud but only to disclose it. In the present case, in contrast, the Verification Letter was mailed by [petitioners] to the defrauded party in order to conceal the falsity of the

3. Petitioners' contention (Pet. 17-18) (which the court of appeals did not deem even worthy of mention) that the government's use at trial of the testimony of Elkin's former attorney violated the attorney-client privilege is baseless. That witness testified concerning Elkin's instruction to him to incorporate Etoile (Tr. 815-856). Since Etoile was a sham company formed and used by petitioners for the sole purpose of defrauding the government, petitioners' communications with counsel concerning incorporation of that entity were in furtherance of the crime and therefore are wholly outside the protection of the privilege. See *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983), petition for cert. pending on other grounds *sub. nom. Vargas* v. *United States*, No. 83-1756; *United States* v. *Dyer*, 722 F.2d 174, 177 (5th Cir. 1983); *In re Grand Jury Proceedings*, 689 F.2d 1351 (11th Cir. 1982) (per curiam); *United States* v. *Hoffa*, 349 F.2d 20, 37 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966). Beyond this, petitioners' position at trial (Tr. 292-294, 297, 654, 838-849, 910-935, 1087) that their former attorney was solely responsible for creating Etoile and for the false claims waived the protection of the privilege they now seek. Cf. *Meyerhofer* v. *Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1194-1195 (2d Cir.), cert. denied, 419 U.S. 998 (1974).

4. Petitioners' claim (Pet. 18-19) that they were denied a fair trial by the district court's refusal to excuse a juror who allegedly had slept during "about eighty percent" of the trial is baseless. At the conclusion of the government's case, petitioners requested the district court to dismiss a juror whom they claimed had slept during most of the trial (Tr.

June 1979 Request and to increase the chances that [petitioners] would retain the fruits of their fraud. Plainly the mailing here played an integral role in the scheme * * *.

862). In response to questioning by the court, the juror admitted that he had "dozed a couple of times" (Tr. 863). After defense counsel declined the court's invitation to question the juror further (Tr. 863), the court denied the motion to remove him (Tr. 869). In these circumstances, the court's refusal to dismiss the juror was within its discretion and did not taint the fairness of the trial. See *United States* v. *Sears*, 663 F.2d 896, 900 (9th Cir. 1981), cert. denied, 455 U.S. 1027 (1982) (district court did not abuse its discretion in refusing to dismiss a hearing-impaired juror because it "had the opportunity to observe the juror closely before deciding that his hearing difficulty would not deny defendant's right to due process or a fair trial"); *United States* v. *Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977) ("[b]ecause of his continuous observation of the jury in court, a trial judge's handling of alleged juror misconduct or bias is only reviewable for abuse of discretion"). Cf. *United States* v. *Cameron*, 464 F.2d 333, 334-335 (3d Cir. 1972) (citation omitted) (district court did not abuse its discretion in removing a juror who had greeted a key defense witness and who, the court believed, had slept " 'at least 50 percent of the time' "). See also *United States* v. *Moore*, 580 F.2d 360, 364-365 (9th Cir.), cert. denied, 439 U.S. 970 (1978) (the defendant's failure to raise an objection to a sleeping juror sooner constituted improper "gamesmanship").

5. As noted above (note 2, *supra*), the court of appeals vacated the imposition of a restitutionary remedy on BPI and remanded for resentencing on the grounds that the sentencing court lacked the power to impose restitution except as a condition of probation under 18 U.S.C. 3651 and that the district court had not placed BPI on probation. Petitioners contend (Pet. 14-15) that the court of appeals erred in adopting the view that probation may be imposed on a corporation under Section 3651. That view, however,

is consistent with the position adopted by the other federal courts that have ruled on the question (see, *e.g.*, *United States* v. *Atlantic Richfield Co.*, 465 F.2d 58, 61 (7th Cir. 1972); *United States* v. *Wright Contracting Co.*, 563 F. Supp. 213 (D. Md. 1983)) and does not warrant review by this Court.

6. Petitioners' various other contentions (Pet. 19), which are unsupported by any argument or authority, require little response.

Petitioners' assertion (Pet. 19) that Elkin's wife was "called by the government as a witness concerning marital conferences" is soundly refuted by the record. Elizabeth Sheppard, Elkin's purported wife, testified that invoices on her company's letterhead falsely reflected that petitioners had purchased certain parts from her (Tr. 769-770). Such testimony did not remotely involve privileged marital communications. In any event, any communications between Elkin and Sheppard were not protected by the spousal privilege because they apparently were never legally married (Tr. 768, 786), see *United States* v. *Lustig*, 555 F.2d 737, 747-748 (9th Cir. 1977), cert. denied, 434 U.S. 1045 (1978), and in any event had lived apart since the early 1960's, see *United States* v. *Brown*, 605 F.2d 389, 396 (8th Cir.), cert. denied, 444 U.S. 972 (1979).

Petitioners' further contention (Pet. 19) that the government "accosted and attempted to intimidate several" defense witnesses also is baseless. The proceedings at trial reflect that this allegation is based solely on the fact that the prosecutor and an FBI agent had interviewed two defense witnesses prior to their testimony (Tr. 870). No improper conduct of any kind was established; in fact, the only witness whom petitioners asked to voir dire testified that he had spoken with the government representatives "as two

gentlemen would at my house" and was "relaxed" the entire time (Tr. 875-876).[9]

Finally, petitioners' unsupported contentions (Pet. 19) that the prosecutor referred to Elkin's failure to testify and that the trial court showed hostility toward the defense were deemed unworthy of discussion by the court of appeals and do not merit the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

JULY 1984

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[9]The second defense witness had been met by federal agents upon his arrival from Italy at John F. Kennedy Airport in New York (Tr. 932). Although the witness testified that, as a result of the stop, he feared he would be "returned back to Italy as per sona non grada" [*sic*] (Tr. 933), in the absence of the jury, the prosecutor explained that he had deliberately instructed the agent not to question the witness in the Customs area so that the witness "would not think that his passing through Customs would be contingent on it whatsoever" (Tr. 935).